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No. 87-2112

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

PAMELA J. BURAK, *Petitioner,*

v.

GENERAL AMERICAN LIFE INSURANCE COMPANY,
Respondent.

REPLY IN SUPPORT OF PETITION
FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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REPLY TO OPPOSITION TO GRANTING THE WRIT

I.

Respondent Misapprehends That The Unlitigated Coverage Issues Were Raised By The Complaint Under Notice Pleading And That The Tenth Circuit Order Directing Entry Of Judgment For Respondent Deprives Petitioner Of A Full Trial On These Issues And Conflicts With A Prior Decision Of This Court

Respondent seeks to distinguish the Court's decisions in *Fountain v. Filson*, 336 U.S. 681 (1949) and *Hormel v. Helvering*, 312 U.S. 552 (1941) by arguing that petitioner's complaint was deficient for not having specifically alleged that (1) the insurance policy endorsement was inconspicuous and (2) the insured was unaware of the endorsement.

Petitioner's complaint alleged there was coverage under the policy. The aforementioned issues concern — indeed, determine — coverage. The issues are embraced within the allegation that there was coverage and petitioner is entitled to the policy proceeds. Thus, the complaint was sufficient to raise these issues.

When petitioner mentioned the issue of endorsement inconspicuousness in oral argument before the court of appeals, it was error to deprive her of an opportunity to present the facts material to that claim by, in essence, ordering summary judgment against her. *See Fountain*, 336 U.S. at 683. *Fountain* requires petitioner be given the chance to litigate these issues in the trial court.[1]

The Court's decision in *Hormel* turned on broad principles of "fundamental justice," not the fact that the case involved questions of tax law. *See Hormel*, 312 U.S. at 557-60. It also requires this case be remanded to the trial court.

Respondent misapprehends rules of notice pleading. The modern objectives of notice pleading are satisfied by a "generalized summary of the case that affords fair notice [which is] all that can be expected." 2A J. Moore, *Federal Practice*, ¶8.03 (2d ed. 1987); *Conley v. Gibson*, 355 U.S. 41 (1987). The pleading rules are designed to "reduce the pleading requirements to a minimum." Moore at ¶8.02. The real importance of the pleading rules is "that they make pleadings, in and of themselves, relatively unimportant." *Id.* "Cases are to be decided on the merits." *Id.*

Respondent would have the courts deny petitioner's right to try meritorious issues on the basis that she did not set out in detail in her complaint the facts on which she bases her claim. This is contrary to law and enlightened modern federal practice. *See Conley*,

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[1] The only difference between this case and *Fountain* (which difference is not of significance insofar as the conflict with the instant case is concerned) is that summary judgment there had been directed by the appellate court against the *defendant* thereby wrongfully depriving her of the opportunity to litigate her *defense* to the claim. Here the *plaintiff* was wrongfully deprived by the Tenth Circuit of an opportunity to litigate certain *claims*. In both cases a fundamental deprivation of rights occurred through a misapplication of Fed. R. Civ. P. 56 through the grant of summary judgment to an appellant despite that factual issues had become apparent on appeal.

355 U.S. at 47. All the rules require is "a short and plain statement of the claim." *Id.*; Fed. R. Civ. P. 8(a).

All pleadings are to be construed "as to do substantial justice." *Conley, supra;* Fed. R. Civ. P. 8(f). Respondent would have petitioner's complaint be construed to work a substantial injustice.

The Tenth Circuit's decision conflicts with this Court's holding in *Fountain* and the reasoning underlying *Hormel.* Respondent has not shown otherwise. Nor has respondent cited authority upholding the disposition of a case by an appellate court by ordering summary judgment be entered for the appellant where factual issues have been pointed out during oral argument on appeal as occurred here.

In *Kern County Land Company v. Occidental Petroleum Corporation,* 411 U.S. 582 (1973), the Court only decided a narrow question concerning construction of a provision of the Securities Exchange Act of 1934, §16(b). Certiorari was not granted to decide the issue presented here, nor did the Court's opinion mention the propriety of the appellate court's grant of summary judgment to the appellant.

Unlike here, the court of appeals in the *Kern County* case observed that "inquiry at the argument failed to reveal any new facts that might be adduced by [the parties against whom the appellate court directed summary judgment] at an evidentiary hearing." *Abrams v. Occidental Petroleum Corp.*, 450 F.2d 157, 166 (2d Cir. 1971), *aff'd sub nom. Kern County Land Company v. Occidental Petroleum Corporation,* 411 U.S. 582 (1973). The appellate court also noted that certain factual conflicts had no "dispositive significance," *id.*, whereas here the questions of (1) whether the endorsement was inconspicuous and unenforceable and (2) whether the endorsement was brought to decedent's attention are dispositive issues which the trial court should decide initially.

In *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973), also relied on by respondent, certiorari was granted "to resolve whether the Federal Reserve Board exceeded its authority under Section 105 of the Truth in Lending Act in promulgating that portion of Regulation Z commonly referred to as the 'Four Installment Rule.' " 411 U.S. at 358 (footnote omitted). The Court was not asked to nor did it decide the question of whether an appellate court can grant an appellant summary judgment in

circumstances similar to this case. Further, there was no indication in the Court's opinion or that of the appellate court of a material factual question to be tried. *Id.*; 449 F.2d 235 (5th Cir. 1971). That alone distinguishes the case.

The other United States Supreme Court decision relied on by respondent, *United States v. Mitchell*, 403 U.S. 190 (1971), merely decided an issue of federal income taxation on community income to a married woman in a community property state despite the exercise of her statutory right of exoneration. There was no discussion or consideration of whether the appellate court acted properly when it reversed the trial court's grant of summary judgment but did not remand for trial. Moreover, there was no mention of any material factual issues in the appellate court's opinion requiring resolution in the trial court, unlike here. *Angello v. Metropolitan Life Insurance Company*, 430 F.2d 7 (5th Cir. 1970), *rev'd sub nom. United States v. Mitchell*, 403 U.S. 190 (1971).

The same is true of the other authorities relied on by respondent. *Sayre v. City of Cleveland*, 493 F.2d 64 (6th Cir. 1974), *cert. denied*, 419 U.S. 837 (1974) (finding no facts in dispute); *Stein v. Oshinsky*, 348 F.2d 999, 1002 (2d Cir. 1965), *cert. denied*, 382 U.S. 957 (1965) (stating "Plaintiffs' attorney has consistently maintained that all the facts are . . . before the court; he did not indicate in argument that any facts warranting a different decision could be alleged or proved. Under these circumstances, we perceive no reason for not bringing this litigation to an end."); *International Longshoremen's and Warehousemen's Union v. Kuntz*, 334 F.2d 165, 168 (9th Cir. 1964) (absence of any genuine issues of material fact "demonstrated conclusively," according to the court's opinion).

Petitioner has been deprived of her Seventh Amendment right to trial by jury of the aforementioned coverage issues. Petitioner waived her right to jury trial only as to the double indemnity claim which was tried May 29, 1985. By then the trial court had already granted her summary judgment on the underlying life insurance coverage. She has therefore not waived her jury demand as to the aforementioned coverage issues which remain to be tried in view of the Tenth Circuit's construction of the policy endorsement effective date language.

Petitioner's right to jury trial is not precluded by the Employee

Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001 *et seq*. This action does not attack in any manner the integrity or administration of the group insurance plan that decedent's employer provided for its employees. Rather, the essence of the action is simply to pursue a claim for the proceeds petitioner asserts is due her as beneficiary of the policy in question. Thus, there is no basis for a conclusion that Congress intended that every claim against an insurance company under its group insurance plan should be litigated with exclusive ERISA remedies. ERISA is not controlling here and does not preempt petitioner's right to jury trial.

II.

The Other Circuit Courts Of Appeals With Which The Tenth Circuit Is In Conflict Remanded The Proceedings For Resolution Of Material Factual Issues

Respondent expends great effort trying to factually distinguish this case from the numerous other circuit courts of appeals' decisions which are in conflict with the instant case. The reasons by which respondent tries to distinguish the cases were not the controlling facts in those cases.

Moreover, respondent overlooks that this petition presents the same simple question decided differently in the other circuits, namely, whether a federal court of appeals can direct summary judgment in an appellant's favor after the appellee has raised material factual issues during oral argument on appeal.

As to this issue, there is a direct conflict among the circuits. This Court should resolve the conflict.

III.

The Decision Below Does Create An Intra-Circuit Conflict On The Same Issue

Respondent urges there is no intra-circuit conflict because the Tenth Circuit in *Eagle v. Louisiana and Southern Life Insurance Company*, 464 F.2d 607 (10th Cir. 1972) was faced with material

factual issues concerning coverage and in this case the court allegedly just had to interpret and construe policy language which respondent urges presented a pure question of law.

This overlooks that the defendant insurers in *Eagle* contended that the terms of the policy entitled them to summary judgment, arguing that the outcome was controlled by "unchallenged documentary evidence." *Id.* at 608. Nevertheless, the *Eagle* panel decided the case was not a proper one for summary judgment, explaining that the rights of the parties required determination after a "full-fledged trial of the merits." *Id.* at 609. This was due to the fact that a controversy raged between the parties over whether the decedent's employer had elected to participate in the policy and whether anything further remained to be done. *Id.* at 608.

This is not unlike the controversy that exists here over (1) whether decedent's employer ever made decedent aware of the policy endorsement dealing with the effective date of coverage and (2) whether the endorsement language was so inconspicuous as to violate public policy. In both cases resolution of the factual disputes controls the outcome despite the documentary evidence regarding the effective dates of coverage.

Although the trial court here made detailed factual findings on the endorsement language itself, it never made findings on the two above-mentioned issues which require resolution and should have resulted in a remand from the Tenth Circuit.

Respondent has failed to distinguish *Eagle* as to the issue presented. There is a direct intra-circuit conflict which requires this Court's resolution.

CONCLUSION

The Tenth Circuit should have remanded this case to the trial court for resolution of the factual issues, one of which, due to the procedural posture of the case, was first mentioned on appeal. This Court is respectfully requested to direct the Tenth Circuit to remand the case to the district court for a trial of the aforementioned coverage issues which, if ultimately decided in petitioner's favor, would render the endorsement unenforceable and allow coverage to decedent's widow beneficiary.

Respectfully submitted,

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